BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY KAY KLAUSMEYER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,023,549
PADGETT ENTERPRISES, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONWIDE MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 6, 2006 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits in the form of an 18 percent permanent partial general disability for injuries suffered in connection with a slip and fall on May 13, 2005, at respondent's office. The Appeals Board (Board) heard oral argument on February 16, 2007.

APPEARANCES

Claimant appeared by her attorney, Stephen J. Jones of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUE

Did claimant suffer personal injury by accident arising out of and in the course of her employment with respondent on May 13, 2005, as alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed as claimant has failed to prove her fall on May 13, 2005, arose out of and in the course of her employment. Instead, the Board finds that claimant's fall was more likely the result of hypoglycemic shock, stemming from claimant's long-standing diabetic condition.

Claimant did bookkeeping for respondent. Her standard office hours were from 7:30 a.m. to 3:30 p.m. At about 3:20 p.m., she would regularly start putting things in her car, which was in the parking lot directly in front of respondent's office. Claimant testified that on May 13, 2005, while putting things in her car, she fell in the parking lot, breaking her left hip.

Claimant's description of how the accident happened varies. In a statement given to an insurance adjuster on May 27, 2005, claimant described slipping while going down from the sidewalk to the parking lot step. Claimant's testimony at the preliminary hearing on July 14, 2005, described a fall as claimant started to exit the building when claimant lost her balance "just slightly on the door jamb."[1] At the regular hearing on August 21, 2006, claimant described hitting her foot on the door jamb, but also testified that she slipped and fell on the curb of the sidewalk. In a conversation with Phillip T. Padgett, respondent owner, claimant said she stepped off the curb at her car and "just fell."[2]

Claimant testified that she tried to get into her car, but was unable to reach the door handle and then crawled back into the office. Claimant was finally able to reach the office phone after several tries and called her husband. Claimant's husband advised her to call 911, which claimant did. However, the call to EMS (Emergency Medical Services) did not come in until 4:26 p.m., one hour and six minutes after claimant first went to her car. Additionally, when EMS arrived at 4:34 p.m., claimant advised that she did not recall anything since eating lunch. Claimant also led Hiedi Isom, the EMS technician, to believe that claimant had been unconscious for an unknown amount of time. Additionally, claimant's blood sugar level was measured at 52 when EMS first arrived. After administering glucose, the EMS technician measured claimant's blood sugar at 64. Ms. Isom did testify that claimant was alert and aware of her situation when they arrived.

Claimant was 54 years old when she testified at the regular hearing. She had been diabetic since she was 8 years old. Claimant testified that she was aware of what precedes a diabetic attack. Claimant's treating physician, Jan M. Hoffman, M.D., board

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[1] P.H. Trans. at 9.

[2] Padgett Depo. at 10.

certified in internal medicine and board eligible in endocrinology, had been treating claimant for 9 to 11 years for her diabetic condition. Dr. Hoffman described claimant's condition as "fairly brittle."[3] He testified that claimant would tend to have erratic rises and falls of blood sugar levels that would tend to occur in an unpredictable fashion over the years. However, with improved techniques, claimant had gradually improved. At the time of the fall, claimant was on a continuous insulin pump. Claimant testified that she had checked her blood sugar before the fall, and it was at 126, which is an acceptable level. Dr. Hoffman opined that claimant's blood sugar could have fallen from 126 to 52 in the time between claimant's test and the EMS check. In his report, Dr. Hoffman stated that if claimant's blood sugar fell below 40, it could have altered her sensorium enough to contribute to the fall. In his letter of September 5, 2006, to claimant's attorney, Dr. Hoffman noted that claimant has gastroparesis, due to her diabetic autonomic neuropathy, which can sometimes make her blood sugars difficult to predict. This could result in the programming of her insulin pump (which may work fine much of the time) to inappropriately dose her excessively with insulin if her stomach emptying happens to speed up unpredictably. When this occurs, claimant's blood sugar could fall quite rapidly.[4]

Dr. Hoffman did find claimant to be a reliable historian. If claimant did not recall having a loss of consciousness, he believed it less likely that her blood sugar fell to a level low enough to precipitate a fall. He did note that claimant has had orthostatic hypotension as a result of her diabetic autonomic neuropathy. If there was a change in position just preceding the fall, from a lying or seated position to standing, then it could have been possible that her blood pressure could have dropped and caused some dizziness that might have factored into the fall.

Claimant's records were examined by Lamont Bloom, M.D., a specialist in diabetes and internal medicine. In his report, Dr. Bloom stated that when a diabetic is under stress or experiences pain, the sugar level goes up. He described this as the "fight or flight reaction."[5] In reviewing the EMS records and emergency room and admission records from St. Joseph Hospital, Dr. Bloom noted that claimant had a history of prior EMS calls related to diabetic shock or hypoglycemia. He noted the emergency room records found claimant's clothes to be sweat-soaked which indicated claimant was diaphoretic, which he attributed to hypoglycemia. He also noted that the time from when claimant went to her car to the time she called EMS was over an hour. He opined that, with the distances involved, it should not have taken an alert person one hour to traverse those limited

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[3] Hoffman Depo. at 4-5.

[4] Hoffman Depo., Ex. 1.

[5] Bloom Depo., Ex. 2 at 2.

distances. He noted the clinical impression from the emergency room was diabetic hypoglycemic shock.[6]

Claimant was examined and treated by board certified orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster was the treating physician for claimant's hip and provided an impairment rating for same. However, Dr. Eyster provided no information regarding claimant's alleged hypoglycemic condition. As the parties have stipulated that claimant has an 18 percent whole person impairment, no additional discussion of Dr. Eyster's testimony is required.

Claimant was also referred by her attorney to board certified physiatrist George G. Fluter, M.D., for an examination on February 1, 2006. Dr. Fluter, in addition to providing his opinion regarding claimant's functional impairment, also discussed claimant's diabetic condition. He acknowledged that he was not an expert on diabetes, but has had some training regarding that condition. He did not believe that claimant lost consciousness because she was alert when the EMS personnel arrived, which according to EMS records was at 4:34 p.m. Dr. Fluter acknowledged that if a person passed out, it would be unlikely they would remember the event.

Claimant's husband, James, testified that claimant called him on his cell phone a little after 4:00 p.m. on the date of accident and that she was alert when he talked to her. Claimant had earlier testified that she called him at approximately 4:10 p.m. He told claimant to call 911. There is no explanation in this record why it took claimant from approximately 4:10 p.m. until 4:26 p.m. to call 911. No cell phone records were placed into the record to pinpoint the timing of that call.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[6] Bloom Depo. at 21-22.

[7] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[10]

It is not disputed that claimant's accident occurred in the course of her employment. Claimant was still on duty and was performing her normal end-of-day routine. However, it is disputed that claimant's injuries occurred out of her employment. To arise "out of" employment requires some causal connection between the accidental injury and the employment.[11] Whether an injury arises out of the worker's employment depends on the facts peculiar to the particular case.[12]

It has been held in Kansas where the effects of a fall are the result of a personal condition, but the conditions of employment place the employee in a position increasing the effects of an injury, the injury becomes compensable.[13] However, where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted.[14]

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[9] K.S.A. 44-501(a).

[10] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[11] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[12] *Id.* at 502.

[13] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev denied* 250 Kan. 804 (1992), citing 1 Larson's Workers' Compensation Law § 12.11 (1990).

[14] *Bennett* at 460, citing *Southland Corp. v. Parson*, 1 Va. App. 281, 338 S. E. 2d 162 (1985).

In the present case, the Board finds that claimant's injuries arose from her personal condition, the diabetes, which resulted in hypoglycemic shock resulting in claimant losing consciousness and falling, hurting her hip. The Board finds it questionable that claimant provided several different versions of how and where the fall occurred. Additionally, the records of the EMS technician and the emergency room conflict with claimant's memory regarding the incidents surrounding the injuries. Finally, the Board finds it troubling that approximately 16 minutes passed between the time claimant supposedly talked to her husband and when claimant finally called 911. These discrepancies cast doubt on claimant's version of the incidents surrounding this fall. The Board, therefore, finds that claimant has failed in her burden of proving that her fall and the resulting injuries arose "out of" her employment with respondent. The Award of the ALJ granting benefits is, therefore, reversed and claimant is denied an award in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 6, 2006, should be, and is hereby, reversed.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid pursuant to the Award of the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of March, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge